IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Appeal From Order no. ll3 of 2006

Yamunabai Mahadev Shinde..... Appellant
vs
Mun Corpn of Gr Mumbai and ors.respondents

Mr S.S.Redekar for appellant
Mrs Geeta Joglekar for BMC
Mr A M Sarogi for respondent no 2

with

Appeal From Order no.ll7 of 2006

The Mun Corpn of Gr Mumbai.. Appellant
vs
Rajaram Gangaram Katkam and anr.. respondents

Ms Geeta Joglekar i/b S H Ujjainwalla & ors for appellant
Mr A M Sarogi for respondents

CORAM; A.M.KHANWILKAR J.

DATED l7.2.2006

P.C.

l. Heard the learned counsel for the parties. These appeals take exception to the mandatory order issued by the trial court dated l2.l.2006 in Notice of Motion No. 286 of 2005 in L C.Suit No. 3082 of 2003. The former appeal is filed by the occupant of the neighbouring structure on whose complaint the Corporation took action against the structure of the respondent-plaintiff. The later appeal is

by the Corporation against the self same order. The plaintiff took out subject notice of motion in the suit filed by him for permanent injunction, asserting that the action of demolition of the suit structure by the officers of the Corporation was in undue haste and malafide. The court below on analyzing the materials on record has accepted the case made out by the plaintiff. The court below has further found that this is an unusual case where the officers of the Corporation have proceeded to execute the order of demolition with electric speed, within hours it was passed, on the same day, inspite of the fact that the plaintiff had given notice to the concerned office of the Corporation that he was moving the court for appropriate reliefs on the same day.

2. Briefly stated, the officers of the Corporation invoked the provisions of section 354A of the Mumbai Municipal Corporations Act, l888, by issuing suit notice to the plaintiff on 27.6.2003. In the notice it is stated that the construction of bricks and massonery with AC sheet roof admeasuring l8 ft x 7 ft x 7.2 ft was "being erected" on the suit site and to stop the work forthwith . Undisputedly, the said notice was issued pursuant

to a complaint filed by the private appellant Ms Yamunabai Mahadeo Shinde, who had made the complaint to the concerned Ward Officer G South Ward on 22.6.2003. It is stated that 27.6.2003 was Friday. It is common ground that the office of the corporation was working only for half day on Saturday i.e. 28.6.2003.That 29th June 2003, being Sunday, nothing could be done either by the plaintiff or by the officers of the corporation. It is the case of the plaintiff that, on receipt of the suit notice, he approached the concerned office of the corporation on the next day i.e. 28.6.2003. However, the officer refused to accept the reply on the ground that the office was not working as it was fourth Saturday of the month. It is the case of the plaintiff that the notice under section 354A was served on him at the fag end of 27.6.2003 leaving no breathing time to effectively reply to the suit notice. Inspite of that some reply was prepared and attempted to be submitted on 28.6.2003, but the same was not accepted by the officer for the reason already indicated above. According to the plaintiff, whether the assertion made in the complaint filed by the private appellant can be accepted or not is a matter for trial. But what is interesting in this matter is

that although the plaintiff once again approached the concerned officer of the corporation on Monday 30.6.2003 at ll a.m., to submit his reply and to inform that he was moving the court for appropriate orders on the same day, however, the demolition of the suit structure was commenced in undue haste and completed at ll.30 a.m.

3. The case of the appellant- Corporation is that, demolition of the suit structure was on the basis of the order passed by the Officer on 30.6.2003. It is stated on instructions across the Bar by the learned counsel for the Corporation that the office of the corporation opens at 8 A.M. Assuming that such order was issued in the early hours on 30.6.2003, to demolish the structure by the officer of the corporation,on which basis the demolition squad proceeded to the suit site for demolition of the structure at ll.30 a.m.; the fact remains that the circumstances emerging from the record leave no manner of doubt that the order was passed by the concerned officer on 30.6.2003 in undue haste and a case of abuse of authority, on which basis the demolition of the structure was hastened and completed on the same day at ll.30 a.m. This is so because, as mentioned earlier, the suit notice was

served on 27.6.2003 which was Friday. According to the plaintiff the notice was served at the fag end of Friday leaving no breathing time to take effective measures. There is no denial of the fact that the notice was served at the fag end of Friday the 27.6.2003, in the reply as filed before the trial court at the instance of the Corporation. The reply affidavit filed before the trial court on behalf of the corporation would only indicate that the notice was served on 27.6.2003; further that as no reply was received from the plaintiff within the statutory period the order of demolition came to be passed and executed. The reply of the Corporation concedes that next day i e 28.6.2003 was Saturday and half working day for the corporation office. It necessarily follows that the time period made available to the plaintiff to give reply was effectively less than 24 hours, in the fact situation of the present case. Taking advantage of Saturday and the following day being Sunday, the officers of the corporation have proceeded to issue demolition order purportedly in the early hours of 30.6.2003 being Monday for demolition of the structure and executed the same on the same day at ll.30 a.m. In other words the entire action of the concerned officers of the

Corporation smacks of malafides. It is obvious that the concerned officers of the Corporation acted on the complaint of the private appellant. There is nothing wrong to initiate action under section 354A of the Act on receiving even a private complaint. However, the record suggests that the officers chose to issue notice to the plaintiff on Friday - which was served on the plaintiff on 27.6.2003 at the fag end of that day. This fact is not denied in the reply filed by the Corporation. The time period provided in the suit notice to give reply is stated to be 24 hours. Obviously, that period would commence only after service of notice. It would have been a different matter if the next day of service of notice was a full working day so as to reckon the period of 24 hours. Even if the case of the Corporation was to be accepted as it is, the next day was fourth Saturday and the office of the Corporation was working only for half day. It is the case of the plaintiff that he visited the Ward Office on Saturday (next day after receipt of the suit notice) to submit his reply but the same was not accepted by the office on the ground that it was a fourth Saturday. The plaintiff approached the Ward Officer once again around ll.00 a.m.on Monday i.e 30.6.2003, to submit his reply which, in

the fact situation of the case cannot be said to be belated one. Whereas, the case of the Corporation is that order for demolition was already passed in the early hours of Monday, the 30.6.2003, by which time, no reply was received. The office of the Corporation, it is stated, opens at 8 a.m. This explanation even if accepted as it is, would mean that the concerned officer passed orders before ll a.m. by which time, no demolition process commenced. It was started thereafter and completed at ll.30 a.m. Suffice it to observe that the concerned officerr(s) made farce of complying with due process of law. Rather,it is a case of abuse of authority by the concerned officer(s) who have acted on the complaint of the private appellant. The complaint was submitted by the private appellant on 22.6.2003 followed by Advocate's notice dated 24.6.2003. No explanation is forthcoming as to why suit notice was issued and served on the plaintiff only on 27.6.2003, at the fag end of Friday, leaving hardly any time for the plaintiff to pursue his legitimate remedy available to him in law. Viewed in this perspective the action of the officers of the corporation is clearly malafide and replete with undue haste. I am therefore,inclined to confirm the findings

recorded by the court below that the action of the concerned officers of the corporation was malafide.

4. There is additional reason which has come to the forefront on perusing the original file which was directed to be produced before me. It is seen that the complaint was filed by the private appellant on 22.6.2003. The said complaint concedes the position that the new structure already has been put up on the site. It is not even remotely suggested that the construction was "in progress" on the site. It is relevant to note that the communication sent by the private appellant was soon followed by the advocate’s notice dated 24.6.2003.The advocate’s notice addressed to the Ward Officer and Senior Inspector of Police of the concerned police station also concedes the position that when the private appellant was away to her native place in the second week of June 2003; in her absence the plaintiff constructed the illegal and unauthorized pacca shed/room in front of her house i.e. room no. 28. In para 2 of the Advocate’s notice it is mentioned that his client (private appellant) had lodged complaint about unauthorised structure erected by the plaintiff on l8.6.2003 but no action

was being taken. This letter also refers to some complaint made by the private appellant to the officers on 23.6.2003 and calls upon to take prompt action.The same Advocate sent another notice addressed to the Ward Officer on 27.6.2003 reiterating the contents of the earlier communication and to take immediate action. There is noting of ACG/S under his signature dated 27.6.2003 which mentions:

> "Complainant met me personally. He states that u/a constn took place in open space and presently it is vacant hence demolish imm by DPL as it is recently constructed".

Obviously, the suit notice is issued thereafter. The other relevant document in the original file is the communication sent by the Asst Engineer (B & P) G (South) Ward dated 28.6.2003 to the Senior Inspector of Police of Dadar Police Station informing him that the suit structure will be demolished on 30.6.2003 at l0.30 a.m. and to provide police force at the relevant time. That means even before a final order of demolition is passed by the competent authority it is predecided to demolish the suit structure. It is possible

that this communication is sent in anticipation of the proposed order as per the practice. Be that as it may, the other document in the original file is a proposal submitted for demolition of the suit structure. The same is initialled by three different officers purportedly on 30.6.2003. However, some doubt arises because of the overwriting of date below the signature of Asst Commissioner G/South Ward who has approved the proposal of demolition. It appears that 27/6 has been later on changed to 30/6. Is it that the proposal to demolish was first approved on 27.6.2003, simultaneously when suit notice was sent on 27.6.2003 and formalities were shown to have been completed on 30.6.2003? Whether the Asst Commissioner was available to approve the demolition proposal before ll a.m. on 30.6.2003? All such issues will arise. However, for deciding this appeal suffice it to observe that from the record of the Corporation it is obvious that the offending structure was already standing on the suit site on the relevant date when suit notice was issued. It was nobody’s case that the construction of unauthorised structure was "in progress"on the site when action was proposed. If it is so, by no stretch of imagination the action under section

354A of the Act could have been invoked, which enables the officers of the Corporation to proceed in respect of the unauthorised construction activity "in progress" on the site and "to stop such activity". In such a situation, however, the only course open to the officers of the corporation would have been to take recourse to any other enabling power permissible under the BMC Act against the unauthorised structure, but obviously not of resorting to the provisions of section 354A of the said Act. Besides, the undue haste in which the demolition has been completed on 30.6.2003 leaves no manner of doubt that the concerned officers acted at the behest of the private appellant. The entire action is malafide. Thus, no fault can be found with the finding recorded by the court below in para 6 of the impugned judgment. Indeed, issuance of mandatory order such as the present one is a drastic order, but on the finding of action being replete with malafide and abuse of authority by the concerned officers of the corporation, the impugned order as has been passed was inevitable.

5. Accordingly, I find no reason to interfere with the directions issued by the court below having

regard to the peculiar facts and circumstances of the present case. The court below in para 7 of the impugned judgment has rightly placed reliance on the decision of this court in Appeal No.5l3 of l982 from the order passed in Notice of Motion No. l293 of l983. In similar situation the court inferred that the action taken by the officers of the corporation was not bonafide nor in good faith.

6. That leaves me with the argument of the private appellant that the private appellant has filed a suit before the Court of Small Causes at Bombay being RAD Suit No.l080 of l999. In that suit an order of injunction is granted on l9.ll.l999, which restrains the landlord from constructing any unauthorized structure or pacca construction whatsoever in front of the suit premises occupied by the private appellant. It is not in dispute that the plaintiff is not a party to the said suit. There is nothing on record to suggest that the plaintiff has acted in breach of this injunction inspite of the knowledge of such injunction.In any case, that will be a matter for trial. The real controversy that needs to be addressed in the present proceedings is only in the context of the action taken under section 354A of the BMC Act. In

so far as that action is concerned,suffice it to observe, as mentioned earlier, same was not only ill-conceived but has been resorted to with purpose, which inference can be drawn from various circumstances available on record. In my opinion, no other contention will be of any avail either to the corporation or to the private appellant because the position obtained at the time of issuance of the notice will have to be restored in terms of the directions given in the impugned order.

7. In the original file the photographs of the suit structure are available. These photographs would only indicate the status of the structure at the time of demolition of the structure. The structure, it appears was already complete and was not in the process of construction, which alone is the basis to invoke the provisions of section 354A of the BMC Act. There are other documents in the original file which was produced before me to reinforce the conclusion recorded herein before. It is not necessary to refer to each of these documents for the inference that has been drawn on the basis of the circumstances referred to above.

8. The next question is whether the corporation

should bear the expenses for reconstruction of the suit structure so as to comply with the directions of the trial court? Burdening the corporation with the expenditure of reconstruction of the suit structure for the malafide action of the officers of the corporation would result in allowing the erring officers of the corporation to take advantage at the cost of public exchequer. Such a course cannot be countenanced. The erring officials will have to be made accountable and should make good the loss. The direction passed by the trial court will have to be construed to mean that individual officials who are responsible for the action will have to be identified and the corporation should proceed against the said officials departmentally and recover the loss to be suffered by the corporation on account of their act of commission and omission . Only this course will serve the ends of justice and remedy the mischief caused by such officials, who acted at the behest of the private appellant. For, the officials invoked wrong provisions (section 354A) to take action in respect of the suit structure; served suit notice on the plaintiff at the fag end of 27.6.2003 which was Friday thereby denying sufficient time to the plaintiff to take recourse

to the remedy permissible in law either of submitting reply within the statutory period of 24 hours from service of the suit notice or for that matter to approach the court of law to challenge the action of the corporation.

9. Accordingly both the appeals are dismissed with cost with the above observations. A copy of this order be forwarded to the Commissioner of the Mumbai Municipal Corporation who will be well advised to take appropriate action against the erring officials who are responsible for the action of demolition of the suit structure in the manner in which it has been found by the trial court and confirmed in this order. The Commissioner to submit the action taken report to this court after l2 weeks.

9. At this stage the counsel for the corporation, on instructions of the Sub-Engineer of G-South Ward states that the operation of this order be stayed to enable the corporation to take up the matter in appeal,if so advised. As the order which is passed by the trial court and confirmed by this court is a mandatory order and if the corporation so desires to take up the matter in appeal,the operation of

this order shall not be given effect to for a period of 6 weeks from today. This hope is expressed on the assumption that the Commissioner of the Mumbai Municipal Corporation will agree with the proposal of Sub-Engineer who is present in court for taking up the matter in appeal inspite of the peculiar facts of this case as are referred to earlier.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY Appellate Side

Appeal From Order No.ll3 of 2006 with Appeal From Order No.ll7 of 2006

Date of Judgment: l7.2.2006

For approval and signature of:

The Hon’ble Shri A.M.KHANWILKAR J.

1. Whether the Reporters of the local papers may be allowed to see the judgment/order?

2. Whether to be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad and Goa offices?